

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2001-493-S - ORDER NO. 2002-864

DECEMBER 20, 2002

IN RE: S. C. Department of Health and)	ORDER DENYING
Environmental Control,)	PETITION FOR
)	REHEARING OR
Complainant/Petitioner,)	RECONSIDERATION
)	
vs.)	
)	
United Utility Companies, Inc.,)	
)	
Defendant/Respondent.)	
)	
_____)	

INTRODUCTION

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Petition for Rehearing or Reconsideration ("Petition") filed by the South Carolina Department of Health and Environmental Control ("SC DHEC"). By its Petition, SC DHEC requests the Commission to rehear and reconsider certain aspects of Commission Order No. 2002-556, dated July 30, 2002, in which the Commission dismissed SC DHEC's complaint.

On December 7, 2001, SC DHEC filed a Complaint with the Commission requesting that the Commission review certain aspects of the tariff of United Utility Companies, Inc. ("UUC"). UUC was served with the Complaint by the Commission's

Executive Director, and UUC filed an Answer to the Complaint and a Motion to Dismiss. Thereafter, SC DHEC filed a Return to Motion to Dismiss, and UUC responded by filing a Reply to Return to Motion to Dismiss. By Order No. 2002-556, dated July 30, 2002, the Commission granted UUC's Motion to Dismiss and thus dismissed SC DHEC's Complaint. SC DHEC then filed the instant Petition which is now before the Commission for consideration. In response to SC DHEC's Petition, UUC filed an Answer to Petition for Rehearing or Reconsideration.

DISCUSSION

In its Petition under subpart A, SC DHEC essentially repeats the allegations of its initial Complaint. However, the last sentence of the paragraph ending at the top of page 3 of the Petition ("Most such plans favor regionalization) is new. Thus that sentence is not proper matter for inclusion in a petition seeking rehearing or reconsideration. In addition to being unsupported by any documentation or authority, this assertion or conclusion was not made in SC DHEC's Complaint. South Carolina law recognizes the premise that matters not initially raised before a tribunal may not be raised for the first time in a motion for reconsideration. See *Crary v. Djebelli*, 321 S.C. 38, 467 S.E.2d 128 (Ct. App. 1995), *rev'd on other grounds*, 329 S.C. 385, 496 S.E.2d 21 (1996) (holding that matter sought to be raised for the first time in a motion to alter or amend under Rule 59(e) SCRCF not cognizable). Thus the Commission will not consider that new material.

Under paragraph B, SC DHEC sets forth the alleged errors in Commission Order No. 2002-556. The Commission will address each alleged error.

(a) SC DHEC alleges error in the Commission's finding that SC DHEC is not an entity entitled to file a complaint pursuant to S.C. Code Ann. Section 58-5-270 (1976). In other words, the Commission found that SC DHEC lacked standing to bring the complaint. Order No. 2002-556 at 4. SC DHEC asserts that it is an agency supervised by the Board of Health and Environmental Control and that the Board acts through the officers and employees of the Department. SC DHEC argues that "[i]nasmuch as Section 58-5-270 authorized complaints by 'any body politic, commission, board, or municipal corporation' (emphasis added), the finding that DHEC does not 'fit' in any category of complainant' was error." Petition at 3.

Section 58-5-270 provides that

Applications and complaints may be made by any corporation, public or private, person, chamber of commerce or board of trade, by any civic, commercial, mercantile, traffic, agricultural or manufacturing association or by any body politic, commission, board or municipal corporation by petition or complaint in writing, setting forth any act or thing done, or omitted to be done, with respect to which, under Articles 1, 3 and 5 of this chapter, the Commission has jurisdiction or is alleged to have jurisdiction. But the Commission may at its discretion refuse to entertain a complaint as to the reasonableness of any rates or charges unless it be signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission or other legislative body of the city or county or city or town affected by the subject matter of such complaint or by not less than twenty-five consumers of the public utility named in the complaint. ...

By its Petition, SC DHEC admits that it is an agency, not a board. Petition at 3. Accordingly, SC DHEC does not have standing under the terms of S.C. Code Ann. Section 58-5-270 (1976). The distinction between an agency and board is recognized by

that portion of the statute that specifically permits the Commission, in the exercise of its discretion, to refuse to entertain a complaint as to the reasonableness of any rates or charges filed by a board unless it is signed by the chairman of the board. Furthermore, as SC DHEC's complaint was not signed by the chairman of its board, the Commission acted within the parameters of its statutory authority in refusing to consider SC DHEC's Complaint.

Further, any contention by SC DHEC that it may be a "body politic" (Petition at 3, footnote 1) is not before this Commission because SC DHEC did not raise this contention in its Complaint. See *Crary v. Djebelli*, *supra*. Additionally, neither of the cases cited by SC DHEC deals with the question of what constitutes a body politic. SC DHEC, in footnote 1 on page 3 of its Petition, stated that "DHEC may be a 'body politic' as well" and cited to the cases of *Bass v. State of South Carolina, a Body Politic*, 414 S.E.2d 110 (1992) and *In Re Medical University of South Carolina, a Body Politic*, 504 S.E.2d 345 (S.C. App. 1998). In the cases cited by SC DHEC, a party in those cases characterized the State of South Carolina and the Medical University of South Carolina as "body politic" in pleadings. However, the characterization of those entities as "body politic" by a party is of no consequence in either case and lends nothing to support the Petition in the instant matter.

Thus as SC DHEC, by its own admission is an agency, not a board, SC DHEC does not have standing to pursue Complaint. Further, as the chairman of SC DHEC's governing board did not sign the initial Complaint filed by SC DHEC, the Commission

was within its discretion to reject the Complaint filed by SC DHEC. The Commission finds no error in its determination in Order No. 2002-556.

(b) SC DHEC next asserts error by the Commission in finding that SC DHEC's Complaint failed to allege a cause of action cognizable under Section 58-5-270 in that the Complaint does not complain directly about an act of UUC. Petition at 3. SC DHEC contends that the scope of inquiry under Section 58-5-270 is not so limited and that dismissal of its Complaint based on the Commission's restrictive interpretation of Section 58-5-270 was error. *Id.* SC DHEC asserts that Section 58-5-270 allows a complainant to set forth in writing "any act or thing done, or omitted to be done, with respect to which ... the Commission has jurisdiction ..." (emphasis added) *Id.* According to SC DHEC's argument, Section 58-5-270 does not expressly limit the acts or things done or undone to those of a regulated utility. *Id.* Further, SC DHEC points out that S.C. Code Ann. Section 58-5-280 (1976) allows the Commission, upon its own motion, to institute an inquiry into any subject matter within its jurisdiction. *Id.* at 3-4.

Contrary to SC DHEC's assertions, Section 58-5-270 does expressly limit the acts or things done or undone to those of a regulated utility because the statute expressly limits the scope of the Commission's authority in complaint matters to "any act or thing done, or omitted to be done, **with respect to which, under the provisions of Articles 1, 3 and 5 of this chapter, the Commission has jurisdiction or is alleged to have jurisdiction.**" Section 58-5-270 (1976) (emphasis added). Articles 1, 3 and 5 of Title 58, Chapter 5 pertain solely to the regulation of public utilities by the Commission. Thus the Commission has jurisdiction in a complaint proceeding to consider only matters

identified in these three articles listed in the statute. The reliance of SC DHEC on the provisions of S.C. Code Ann Section 58-5-280 (1976) is also flawed as enforcement of the Clean Water Act is clearly outside the scope of the Commission jurisdiction found within Articles 1, 3, and 5 of Title 58, Chapter 5.

(c) SC DHEC alleges the Commission erred by rejecting SC DHEC's argument that the pass-through provision of which SC DHEC complained was capable of repetition yet evading review. Petition at 4. SC DHEC states that it "has reason to believe" that it may not be allowed to intervene in a proceeding before the Commission to consider an interconnection agreement. The Commission finds this assertion without merit as SC DHEC's assertion made in its Petition is speculative and is contradicted by SC DHEC's initial Complaint

First, SC DHEC's reasoning is purely speculative. Upon a timely filed petition containing a proper showing of standing, grounds for intervention, and the position of the proposed intervenor, the Commission's Rules and Regulations allow an interested party to intervene in a proceeding. See 26 S.C. Code Regs. 103-836(a)(3) which provides that a Petition to Intervene in a formal proceeding ... shall set forth clearly and concisely: (a) the facts from which the nature of the petitioner's alleged right or interest can be determined; (b) the grounds of the proposed intervention; and (c) the position of the petitioner in the proceeding. Second, SC DHEC's own Complaint refutes the statement from SC DHEC's Petition that it "has reason to believe" that it may not be allowed to intervene in a proceeding before the Commission to consider an interconnection agreement. In its initial Complaint, SC DHEC referenced a case in which SC DHEC

intervened and that case concerned the approval of an interconnection agreement. See Docket No. 2000-511-W/S, In Re Petition of Carolina Water Service, Inc. Requesting Approval of an Interconnection Agreement with the Georgetown County Water and Sewer District for Bulk Sewer Collection from Lincolnshire and Whites Creek Subdivisions Sewerage Collection Facilities located in Georgetown County, South Carolina. SC DHEC was a party to that case and had the opportunity to appear and argue its point with respect to implementation of 208 Plans. Thus, SC DHEC has participated in a forum where it had the opportunity to make its point. Therefore, SC DHEC has not demonstrated that the pass-through provision of which SC DHEC complained was capable of repetition yet evading review.

In support of its assertion, SC DHEC cites to the case of *League of Women Voters of Georgetown County v. Litchfield-by-the-Sea*, 305 S.C. 424, 409 S.E.2d 378 (1991). The Commission finds SC DHEC's reliance upon *League of Women Voters* to be without merit. In *League of Women Voters*, the League of Women Voters challenged the cumulative effect of decisions by SC DHEC and the South Carolina Coastal Council denying aspects of interlocked staff decisions. While there are no "interlocked staff decisions" in the instant matter, the question in *League of Women Voters* was not one involving the standing of an agency to complain to another agency about the agency's own acts. Rather, *League of Women Voters* dealt only with administrative due process in cases affecting "private rights" protected by the administrative due process clause of the South Carolina Constitution. S.C. Constitution Article I, Section 22 affords no protection to SC DHEC since SC DHEC has no private rights. See S.C. Const. art. I, § 22 which

provides in part that “[n]o person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard ... and shall have in all such instances the right to judicial review.” Finally, even if the above-cited constitutional provision did apply, nothing in Order No. 2002-556 denies SC DHEC notice, an opportunity to be heard, or the right to judicial review. If and when there is a matter on an interconnection agreement brought before the Commission involving UUC, or any other public utility with a pass-through provision that SC DHEC believes implicates its purported 208 planning authority, then an actual case or controversy will exist, and SC DHEC will have an opportunity to intervene in that proceeding just as SC DHEC has done in the past.

Thus the Commission finds no merit in SC DHEC’s argument that the pass-through provision of which SC DHEC complained was capable of repetition yet evading review.

CONCLUSION

Having fully reviewed the arguments set forth in SC DHEC’s Petition and finding each of SC DHEC’s arguments to be without merit, the Commission denies SC DHEC’s Petition.

IT IS THEREFORE ORDERED THAT:

1. The Petition for Rehearing or Reconsideration filed by the South Carolina Department of Health and Environmental Control is denied.

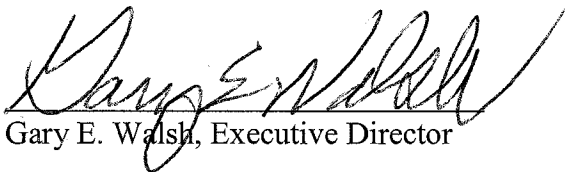
2. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Mignon L. Clyburn, Chairman

ATTEST:


Gary E. Walsh, Executive Director

(SEAL)